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POLICE OFFICER'S HANDBOOK

THE COMMON LAW CRIMES

PART I

MURDER

FRISK SEARCH...IT
CAN SAVE YOUR LIFE

INFORMER AFFIDAVITS
IN SEARCH WARRANTS...
ANOTHER REVERSAL
(State v. Harrell)

FLEMING'S NOTEBOOK...Chapter 99

Informer Affidavits in Search Warrants
(As of 3/21/74 - S.C. Supreme Court)
A. Why is Informer Thought to be Reliable?
B. Informer Affidavit Rule

Prepared under the direction of E. Fleming Mason Producer of Crime-to-Court ETV Law Enforcement Informational Programs, in cooperation with South Carolina Educational Television Network with funds Provided through the South Carolina Criminal Justice Academy.

LAW ENFORCEMENT - ETV TRAINING PROGRAM

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FOREWORD

The frisk search for weapons is one of the most important rights of police officers ever recognized by the United States Supreme Court. It was established early in our law that a police officer could lawfully search a person under arrest for any crime...for evidence and weapons...but it was not until 1968, in a case entitled Terry v. Ohio, 20 Led 2d 889, that the Supreme Court stated that there were other circumstances short of arrest or probable cause for arrest, in which a limited search for weapons was justified for the protection of the officer and others. The right to a frisk search should be known thoroughly by every officer. It could save his life.

Another important criminal conviction has been reversed because the issuing judge and the investigating police officer did not know the simple requirements of an informer affidavit in a search warrant. State v. Harrell (SC, filed March 21, 1974). That decision is discussed and explained in this handbook. A simple

rule is set forth to insure that informer affidavits are sufficient.

Julius B. Ness
Associate Justice-Elect
South Carolina Supreme Court

THE COMMON LAW CRIMES

MURDER

Some crimes for which a person might be convicted in the courts of the State are not set out in our State Code of Laws. They come from the common law of England, as does the basic law of most of the states of the United States. An exception to this rule is Louisiana, which was settled first by the French and, as a result, based its system of laws on those of France...known as the Napoleonic Code. Louisiana has no common law.

Murder...one of the common law crimes...is defined in our State Code of Laws, and the penalty for conviction is set out also, but nowhere therein will there appear a statement that murder is unlawful. That fact is established as part of the common law.

NOTES FROM WHARTON'S CRIMINAL LAW AND PROCEDURE...ANDERSON

DEFINITION

Murder is the (1) felonious (2) killing (3) of a human being (4) by another (5) with malice aforethought.

When a statute merely declares the punishment for murder but does not define it, the common law determines the meaning of the offense.

MALICE AFORETHOUGHT

A felonious killing is murder when the defendant has acted with malice aforethought. In the absence of malice aforethought, the offense is merely manslaughter. The division of murder into statutory degrees does not affect the requirement of malice aforethought, since it is necessary to show that there has been a murder before its degree is determined. In some states the requirement of malice has been abandoned.

Malice aforethought cannot be given a literal interpretation and has acquired a strictly technical definition and comprehends a number of different conditions of mind. It is said to include all those states and conditions of mind which accompany a homicide committed without legal excuse or extenuation. Malice aforethought may be regarded as the mental state of a person voluntarily doing an act which ordinarily will cause serious injury or death to another without excuse or justification. While actual hatred or enmity may be present, malice is not limited in its meaning to hatred, ill will, or malevolence. Moreover, malice aforethought may exist although there is no particular enmity or ill will toward the victim and even though there is no specific intent to take human life.

If the defendant had voluntarily committed an act which in the ordinary course of events would or might cause death or serious bodily harm, he is liable for murder although he did not actually intend that death should follow. Accordingly, if the defendant intended

only to inflict a severe beating on or to maim the victim, an unintended death which results is murder for which the defendant is responsible. Under this principle it has been held that a defendant is responsible for murder when his attempt to produce a miscarriage by violent methods caused the death of the woman. If there was no intent to inflict a severe injury on the woman, or if the death was due solely to the defendant's negligence, he is not liable for murder.

If a person discharges a firearm intentionally without a specific intent to inflict injury, but under such circumstances as to evince a heart regardless of social duty, and the act naturally tends to and does destroy human life, it is murder. Hence, if a person intentionally discharges a firearm into a crowd of people, with a disregard of consequences, and death results therefrom, or into a dwelling house in which he has reason to believe there are people living, thereby killing a person therein, though without intention to kill or injure anybody, he is guilty of murder. Likewise, if a person intentionally discharges

a firearm into a railroad train, thereby killing a person, though without intention to injure anyone, he is guilty of murder. It has even been held that if one points a loaded gun and discharges it, but not in the direction of a person who is in fact killed by the bullet reaching his person, glancing from another object, he is yet guilty of a homicidal offense, if he knew, or ought reasonably to have known, that his conduct was dangerous to human life and yet he acted regardless thereof.

In a number of states statutes declare that an unauthorized killing is murder "when done in the commission of an act imminently dangerous to others, and evidencing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual". Some states hold that this provision is not applicable unless it can be shown that the accused acted from universal malice and that the act causing death had imperiled the lives of many persons other than the actual victim. Thus a defendant is not guilty under this provision if death results when he attempts abortion.

Malice as an essential characteristic of the crime of murder may be either express or implied.

An intent to kill, or the existence of premeditation or deliberation, or the existence of any other mental state beyond that embraced within the concept of malice aforethought is not required to constitute murder at common law. Such an additional mental state is required to constitute first degree murder.

AFORETHOUGHT

The element found in aforethought in "malice aforethought" requires merely that the act which causes the homicide be committed while the actor had a mental state of malice. It is sufficient that malice existed at the time of the commission of the act and it is immaterial how long it existed before.

The fact that malice aforethought means merely that malice must exist at the same time as the act, in effect makes "aforethought" meaningless surplusage,

since the requirement is satisfied by the presence of malice or "concurrent" malice, rather than an antecedent malice. The unimportant character of the adjective "aforethought" is seen in the fact that in many opinions "malice" and "malice aforethought" are used interchangeably and that in many, "aforethought" is itself omitted.

EXPRESS MALICE

Express malice is defined as an intent either to kill or do serious bodily harm or with reckless disregard of the consequences of the act, to do any cruel act which results in death. It is not material that the malice be directed toward the actual victim. If while doing an act with express malice directed to one person, the actor accidentlly kills another person, he is guilty of murder to the same extent as though he had directed his act toward the actual victim. Nor is it necessary that malice be directed at any particular victim. Thus if a man throws from a roof into a

crowded street, where persons are constantly passing and repassing, a heavy piece of timber, calculated to produce death to such as it might strike, and death ensues, the offense is murder at common law.

It is well settled that when a person intentionally discharges a firearm into a crowd of people, with a disregard of consequences, and a death results therefrom, he is guilty of murder. The defendant is also guilty of murder, although he did not intend to kill, when death results from his act when he intentionally discharges a firearm without a specific intent to inflict injury, but under such circumstances as to evince a heart regardless of social duty, and the act naturally tends to destroy human life; when he intentionally discharges a firearm into a dwelling house in which he has reason to believe there are people living; or into a railroad train, or a closed, occupied automobile; or when he maliciously puts an obstruction on a railway track.

IMPLIED MALICE

Confusion exists as to the meaning of implied malice. Some courts make the distinction between express malice as that which is expressly stated by words or which is proved by direct evidence, and implied malice which is inferred from the evidence in all other cases.

Generally, however, implied malice may be regarded as the equivalent of the phrase "constructive malice". That is, malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.

SEARCH AND SEIZURE

FRISK SEARCH

The very great value of the frisk search for weapons, now permitted in specified circumstances, has again been illustrated in two murders of young police officers in this State. In a time when drug-oriented violence is commonplace, another review of the Terry case and its teachings could save police lives in the future.

In plain language, Terry holds that when a police officer faces a situation that requires investigation, he has the right to search suspects for weapons only ...even though he might not have the right to arrest at that point...if the facts justify a belief that the suspects might be armed. The frisk search has nothing to do with evidence, and should be limited to action designed to protect the officer (and others) against violence during the investigation.

Following is language from the United States Supreme Court relating to the right of a police officer to conduct an investigatory frisk search for weapons...Terry v. Ohio, 20 Led 2d 889:

WHEN FRISK JUSTIFIED

"When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

FRISK SEARCH DEFINED

"A search for weapons in the absence of probable cause to arrest...must...be strictly circumscribed by the exigencies which justify its initiation. Thus it

must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.

"...a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.

"The officer need not be absolutely certain that the individual (suspect) is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

LIMITS OF FRISK SEARCH

"The sole justification of the (frisk) search... is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."

FRISK SEARCH...CONCLUSION

"We...hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own and others' safety, he is entitled for the

protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is reasonable under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken."

FRISK SEARCH NEED NOT BE DELAYED!!

"...a limited frisk (search) incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully...confronting a person suspected of a serious crime, should have to ask (even) one question and take the risk that the answer might be a bullet." (Justice Harlan, concurring.)

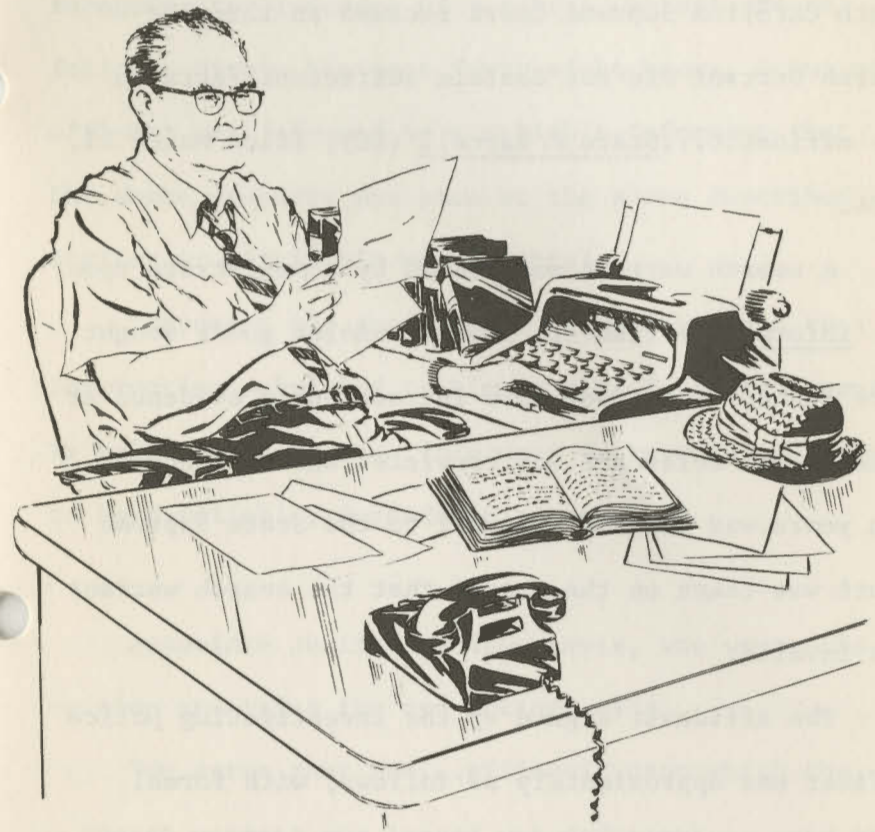
GENERAL COMMENTS

In order to justify a frisk search, the police officer must have reasonable grounds for stopping the subject. Such grounds need not amount to probable cause to arrest, but they must be something more than a desire to question. There must be some fact that justifies the officer in forcibly detaining the subject for brief, investigatory questioning. Terry frisk search for weapons is lawful when:

1. The officer has reasonable cause to think a situation warrants investigation.

2. The circumstances justify a suspicion that the suspect(s) might be armed.

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 99:

Another criminal conviction (receiving stolen goods...sentence 10 years) has been reversed by the South Carolina Supreme Court because an informer search warrant did not contain sufficient facts in the affidavit...State v. Harrell (SC), filed March 21, 1974.

A search warrant was issued by a magistrate upon an 'informer' affidavit, and the stolen goods sought were found. The goods were introduced in evidence at trial. The defendant was convicted and sentence of ten years was imposed. Appeal to the State Supreme Court was taken on the ground that the search warrant was invalid.

The affidavit signed by the investigating police officer was approximately as follows, with formal parts deleted:

"Personally appeared (name of officer), who, being duly sworn, says that he has good reason to believe

that (name of suspect) has concealed on his premises at or near (description and location of trailer) a quantity of stolen goods (description of goods).

"And that the facts tending to establish the foregoing for issuance of a search warrant are as follows: Within the past forty-eight hours, (name of officer) was informed by a reliable informant that the above property was seen at the above described trailer or within his motor vehicle.

"Deponent has good reason to believe that the information submitted to him by a reliable informant is believeable because informant is known by officer to be a reliable, dependable person."

Associate Justice Woodrow Lewis, who wrote the opinion reversing the conviction, said:

"We agree that the...affidavit upon which the...search warrant was issued was deficient..., and that the search of the...trailer...was illegal. ...The evidence obtained from the trailer pursuant to the...search was, therefore, inadmissable and prejudicial."

With slight additions, the affidavit would have been lawful and the conviction would not have been reversed. Using the same words as the subject affidavit as nearly as possible, such affidavit could have been made sufficient and lawful had it been worded as follows, for example:

WHY IS THE INFORMER THOUGHT TO BE RELIABLE?

"Deponent has good reason to believe that the information submitted to him by an informer is believeable because such informer has been known to the affiant for two years, such informer has given similar information to the affiant and other officers of his Department on other occasions during that period of time, and such information has proven generally, to be reliable."

COMMENT: The affidavit in the Harrell case stated only that the informer was reliable and dependable. It did not state why the officer concluded that

he was reliable. The example set out above gives facts upon which the officer bases his opinion that his informer is reliable.

WHAT DID THE INFORMER SAY HE SAW OR HEARD TO CONVINCE HIM THAT THE GOODS SOUGHT WERE AT THE PLACE TO BE SEARCHED?

"And the facts tending to establish the foregoing for issuance of a Search Warrant are as follows: Within the past forty-eitht hours, (name of officer) was informed by such informer that the property described above was seen by him at the trailer described, on Thursday, (date)."

COMMENT: The affidavit in the Harrell case says simply that the informer said that the goods were seen at the suspect premises. It does not say who saw the goods. The example, on the other hand, states that the informer himself saw the goods, and gives the date upon which he saw them.

INFORMER AFFIDAVIT RULE

I. State why the informer is thought be be reliable.

II. State what the informer saw or heard to make him believe that the contraband or stolen goods are in the suspect premises.

III. State approximately when the informer saw or heard such things.

30...EFM

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